UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 16

SECURITY CONSULTANTS GROUP, INC.

Employer,

Case No. 16-RC-10961

and

UNITED GOVERNMENT SECURITY OFFICRS
OF AMERICA INTERNATIONAL UNION

Petitioner

and

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA) and its LOCAL UNION NO. 48 Interenor

INTERVENOR SPFPA'S REQUEST FOR REVIEW

Intervenor International Union, Security, Police and Fire Professionals of America (SPFPA) and its Local Union 48, by its attorneys, Gregory, Moore, Jeakle & Brooks, P.C., pursuant to § 102.67 of the Board's Rules and Regulations, requests review of the Regional Director's Decision and Order (copy enclosed) in the above matter as follows:

Petitioner seeks an election in the unit of guards at issue. During the Representation Petition Hearing, Intervenor raised the issue of Petitioner's ability to represent guards within the meaning of Section 9(b)(3). Specifically, Intervenor introduced or cited to evidence that suggested that Petitioner had entered into an agreement with the SEIU (a non-guard union) that included Petitioner disclaiming interest in a bargaining unit of guards so that the SEIU could assert rights representation over the unit.

This Request for Review concerns the Region's secret review of a secret agreement between Petitioner and the SEIU and the refusal of the Region (without explanation) to enter that

subpoenaed secret agreement into the record. Secret decisions after secret reviews of secret agreements do not comport with the Board's requirements.

Facts:

Prior to the hearing, Intervenor subpoenaed all agreements between Intervenor and other unions (including the SEIU) and documents establishing all payments by other unions (including the SEIU) to Petitioner. (Intervenor Exhibit 1) Petitioner filed a Petition to Revoke, received by undersigned SPFPA counsel the morning of the hearing. (Intervenor Exhibit 2) The Petition to Revoke acknowledged an agreement between Petitioner and the SEIU to resolve litigation over the bargaining unit referenced above. The Hearing Officer granted in part the Petition to Revoke but enforced the Petition with respect to any agreement between the SEIU and Petitioner relative to the settlement of the litigation. Petitioner refused to provide the document(s), the hearing remained open (and was adjourned for the day) and the Region (and Intervenor) began making arrangements to file an action in U.S. District Court to obtain the document.

Five days later, on August 3, 2010, after 6:00 pm EDT, Petitioner sent a short e-mail to the Regional Director, which stated in its entirety:²

Dear Regional Director Kinard: With respect to the issue regarding the enforcement of the SPFPA subpoena in the above noted matter and the UGSOA's Petition to revoke the same, the UGSOA, in an effort to resolve all outstanding issues regarding the same, requests that the Regional Director conduct an in camera review of any document(s) that the UGSOA may produce in response to the portion of the SPFPA subpoena that the Hearing Officer has permitted to remain in force. This offer is conditioned on the Region agreeing that once it has decided whether or not to grant the Petition to Revoke in full that the reviewed document(s) be returned to the UGSOA without the same being provided to the SPFPA or its counsel; moreover, the UGSOA would reserve all of its rights relative to any subsequent actions initiated by either the Region and/or the SPFPA regarding any aspect of the subject subpoena.

² Each document referred to herein is attached to this Request for Review as part of Exhibit 1.

Petitioner complained that the subpoena was received just the day before the hearing. The subpoena sought only discrete agreements between the UGSOA and non-guard unions or documents evidencing payments to the UGSOA from non-guard unions during a limited period of time. Certainly it would not be burdensome to obtain and produce the limited documents requested. Further, as discussed below, the Hearing Officer enforced in part the subpoena.

The following morning, the Hearing Officer contacted the undersigned counsel for the SPFPA. I was on a family vacation, away from home and office. The Hearing Officer asked for Intervenor's position with respect Petitioner's request and a discussion of merits of the request took place.³ The same day, at approximately 1:00 pm EDT, while the undersigned was on a bike ride on a bike trail miles from the vacation home, the Hearing Officer called back and stated that the Region wanted a written response to Petitioner's request no later than close of business that same day. I protested, requested until the following Monday to respond, but the request was denied. I was forced then to return to the rented vacation home and without access to the case file or the ability to conduct appropriate research, and in a very short period of time, provide the Region with a written response. (See August 3rd letter)

The next day, August 4, 2010, I was called by the Hearing Officer who informed me that Petitioner's counsel had an *ex parte* conversation with the Regional Director in which he argued in support of Petitioner's request. I was then offered the opportunity to discuss the issue with the Regional Director, with such discussion taking place the following day.

On August 6, 2010, the Hearing Officer issued an Order Granting Petitioner's Motion for an In Camera Review. On August 9, 2010, Intervenor filed an appeal with the Regional Director and further provided evidence with respect to why the agreement between the SEIU and Petitioner was relevant to the issue of Petitioner's 9(b)(3) status.

On August 12, 2010, the Hearing Officer sent the parties a letter that states in part:

I have concluded my *in camera* review of a document submitted by Petitioner. I have determined not to enter the document into the record and I hereby grant the motion to quash in its entirety.

³ This ex parte discussion was initiated by the Hearing Officer.

No further explanation is provided as to why the Hearing Officer determined not to enter the document into the record. The August 12th letter also states that the Hearing Officer declared the hearing closed, notwithstanding Intervenor's August 9, 2010 letter stating that Intervenor had additional evidence to introduce into the record when the hearing resumed.⁴

On August 17, 2010, Intervenor requested that the Region provide copies of all *ex parte* communication received from Petitioner with respect to the issue, including recordings or notes of *ex parte* conversations. On August 18, 2010, Intervenor filed an appeal of the Hearing Officer's decision with the Regional Director. On August 19, 2010, Intervenor again requested the documents. The Regional Director did not provide any response to the requests until she issued her Decision and Direction of Election.

In the August 18th appeal to the Regional Director, Intervenor informed the Regional Director that it intended to produce a witness with relevant information at the resumed hearing, a witness who was not available to Intervenor at the original July 28th hearing as he did not resign as an official with Petitioner until July 29, 2010.

On August 20, 2010, the Regional Director issued her Decision and Direction of Election.

Copies were served upon Petitioner and the Employer. No service was made upon Intervenor.

Late in the day August 30, 2010, a Region 16 representative contacted the undersigned to discuss election arrangements. The undersigned responded that the discussion was premature as the Regional Director had yet to issue her Decision. At that point, for the first time, Intervenor was informed that a Decision and Direction of Election was issued August 20th. A copy was served upon Intervenor on August 31, 2010.

After not serving Intervenor with the Decision and Direction of Election until August 31st, the Region then informed Intervenor that any Request for Review had to be filed with the

⁴ No prior notice was provided by the Hearing Officer or the Region that the Hearing Officer was contemplating declaring the hearing closed.

Board no later than September 3, 2010 (14 days after the issuance of the Decision). Intervenor protested but was told simply that Intervenor could request additional time from the Board. After the undersigned confirmed the Region's position in writing and requested written confirmation from the Region as to the due date of the Request for Review, the next day the Region changed its mind and informed Intervenor that in fact that Request for Review was not due until 14 days after the service date of August 31, 2010. (See e-mail chain included in Exhibit 1.)

Argument:

The Decision and Direction of Election should be vacated and the Board should direct that the hearing be reopened, the subpoena enforced and Intervenor be permitted to introduce additional relevant evidence. The Hearing Officer and Regional Director made significant errors in the conduct of the hearing and rulings that have prejudiced Intervenor's rights. Further, the issues raised by Intervenor are not covered by officially reported Board precedent. NLRB Rules and Regulations 102.67

It must be remembered that the hearing in this matter is a fact finding, with the Region having the obligation to develop a record that permits a full factual record necessary to determine outstanding issues. Further, Section 9(b)(3) is a statutorily imposed requirement that prohibits that Board from certifying a union to represent guards under certain circumstances. In this case, Petitioner is seeking to raid Intervenor and take a unit of guards.

It has now been established that Petitioner entered into a written agreement with the SEIU, that document having been reviewed by the Hearing Officer in secret. Since Section 9(b)(3) of the Act prohibits the direct or indirect affiliation of a guard union with a non-guard union, any written agreement between two such entities would be relevant to a fact finding inquiry as to whether a union is entitled under the Act to represent guards. Accordingly, the

document requested is *per se* relevant to the inquiry; whether it by itself or with other record evidence establishes a direct or indirect affiliation is the decision to be made by the Regional Director and the Board.

Regardless, in the particular circumstances of this case, Intervenor has established that the SEIU-UGSOA agreement is relevant to the inquiry of Petitioner's 9(b)(3) status. Intervenor has explained its position in its July 30, August 3, August 9 and August 18, 2010 letters to the Regional Director (all attached as part of Exhibit 1). Intervenor incorporates the content of those letters and the arguments therein. In sum, those letters establish that the UGSOA was threatened with destruction by the SEIU if the UGSOA would not merge into the SEIU (which of course would cause the UGSOA to lose its 9(b)(3) status). The SEIU then took aggressive action against UGSOA interests. The UGSOA filed a lawsuit against the SEIU. The UGSOA was on the verge of financial collapse. The UGSOA disclaimed interest in a bargaining unit that it had claimed was of vital importance, handing those employees over to the SEIU. The UGSOA entered into an agreement with the SEIU to resolve the lawsuit. That agreement apparently was the document reviewed by the Hearing Officer.

In support, Intervenor provided the Regional Director with the following in the August 9th letter:

[T]here is significant evidence that the UGSOA was in a financial crisis during the period of time leading to the agreement. The UGSOA LM-2 report shows that as of December 31, 2009, the UGSOA had net assets of only \$97,564.00, 63% less than the previous year. In 2009 the UGSOA spent more than \$150,000 more than it took in; at that rate, the UGSOA would run out of money in the early summer, 2010 (which is when the agreement in question was executed).

In addition to bleeding money, the UGSOA is bleeding dues paying members. The 2008 LM-2 shows 9,150 dues paying members. By December 31, 2009, that number had dropped precipitously, to only 5,935. This, of course, was before the UGSOA then disclaimed interest in the hundreds of members in the unit in question.

Although only 5,935 members paid dues as of December 31, 2009, the UGSOA represented a total of 11,425 of members/non-members/fee payers. (There were 594 agency fee payers and 4,896 unit members who were not members or fee payers.) Thus, as of December 31, 2009, the UGSOA had net assets of only \$8.54 for each unit member it was required to represent.

The UGSOA filed the lawsuit against the SEIU alleging it was under attack because it refused to merge into the SEIU. The UGSOA claimed that it would suffer considerable and irreparable harm unless the SEIU was enjoined from attacking the UGSOA. The UGSOA spent considerable attorney fees prosecuting the lawsuit, twice bringing motions seeking injunctive relief and twice forcing NLRB hearings on decertification petitions the SEIU filed in the unit in question. All the while the UGSOA is bleeding money, with a significant portion of their expenditures going for attorney fees (including nearly \$380,000 paid in 2009). This does not include another \$41,236 owed as of December 31, 2009 but not paid to the Washington, D.C. law firm handling the lawsuit against the SEIU.

The continuation of the lawsuit against the SEIU could force the demise of the UGSOA as it was running out of money including money to pay the attorney fees to process the lawsuit. Thus, any agreement ending the lawsuit demonstrates the control the SEIU had over the UGSOA and the ability it had to force the UGSOA to do what the SEIU wanted, including disclaiming interest in the unit in question.

If the agreement(s) contain any provision for the payment of money from the SEIU to the UGSOA, this demonstrates further affiliation and control (and relevance). This would include not only the direct payment of money but also any other way in which the UGSOA phrased it, e.g., repayment of costs or attorney fees, etc. The payment of any money to the UGSOA in its precarious financial position demonstrates that the UGSOA may have been dependent on the SEIU to continue to operate.

The issue of an established 9(b)(3) union receiving financial aid from a non-9(b)(3) union as in the context of this case may very well be an issue of first impression for the Board. Thus, a complete factual record must be created to permit the Board to determine whether the cessation of the lawsuit, the disclaimer of interest and any funds paid by the SEIU affected the UGSOA's ability to continue to represent guards under 9(b)(3). This can only occur if the agreement(s) between the UGSOA and the SEIU are produced pursuant to the subpoena.

The above is just an example of the issues that may exist resulting from the agreement in question. There are others. It is unfair to the SPFPA to have to guess at the content of the agreement just to be able to alert the Region as to potential issues that may arise. In this regard, I note that the only information we have regarding the UGSOA's basis and support for its In Camera demand is the short e-mail that was sent to you, without citation to legal precedent or supporting

authority. I understand that the UGSOA attorney had a subsequent telephone conversation with you but I am not privy to the content of that conversation.

The August 3rd letter contains reference to public documents contained in the record of the lawsuit filed by the UGSOA against the SEIU:

The record evidence from the hearing is that the UGSOA represented a bargaining unit of guards in Washington, D.C. that it ultimately disclaimed interest in and the SEIU now claims to represent. The UGSOA itself in its Petition to Revoke referenced the agreements that are at issue, those that apparently resolved the lawsuit. The lawsuit between the parties which led to this agreement (1:09-cv-01490)(U.S. District Court, DC) reveals that the UGSOA collective bargaining agreement did not expire until May 31, 2011, yet the UGSOA disclaimed interest in favor of the SEIU a year early. The lawsuit includes claims by the UGSOA that the SEIU was in violation of yet another agreement between the UGSOA and the SEIU in organizing the UGSOA's employees and claimed there would be significant and irreparable harm to the UGSOA if the SEIU was permitted to continue, including the loss of significant income to the UGSOA. James Carney, former UGSOA President, claims in an affidavit filed in the lawsuit that in 2009 the SEIU wanted the UGSOA to merge into the SEIU, the UGSOA refused, the SEIU then actively started organizing UGSOA employees (including filing decertification petitions against the UGSOA for the unit in DC and the UGSOA then sued the SEIU. (September 30, 2009 affidavit, filed on October 1, 2009). How can the resolution of that lawsuit – including the UGSOA voluntarily (if it was voluntary) disclaiming interest in a unit so important to it that it filed the lawsuit in the first place – not be relevant to the issue in the instant case?

In requesting the Regional Director to overrule the Hearing Officer, Intervenor wrote (on August 18th):

The Hearing Officer's statement granting the motion to quash does not provide a reason why the motion was granted. The Hearing Officer states only that he has reviewed "a document" and that he has "determined not to enter the document into the record." No explanation is provided why the document — presumably an agreement between the UGSOA and the SEIU — should not be entered into the record. No explanation is provided as to how a document the Hearing Officer previously determined could be relevant to the issue before the Region now decides, upon his secret review, should not be placed in the record.

Frankly, as the Hearing Officer provides no explanation as to his decision at all, the SPFPA is again placed in a fundamentally unfair position of having to guess at why something has happened in this case.

I incorporate my July 30, August 3 and August 9, 2010 letters to you with respect to the facts and our arguments. Essentially we have provided evidence

that the UGSOA was threatened with destruction by the SEIU if the UGSOA would not merge into the SEIU (which of course would cause the UGSOA to lose its 9(b)(3) status). The SEIU then took aggressive action against UGSOA interests. The UGSOA filed a lawsuit against the SEIU. The UGSOA was on the verge of financial collapse. The UGSOA disclaimed interest in a bargaining unit that it had claimed was of vital importance, handing those employees over to the SEIU. The UGSOA entered into an agreement with the SEIU to resolve the lawsuit. That agreement apparently is the document reviewed by the Hearing Officer.

In his Order Granting Petitioner's Motion for *In Camera* Review, the Hearing Officer states that "Petitioner has taken the position that the document is, in fact, not relevant and harm could inure to the Petitioner if the document is made public."

With respect to the question of relevance, "... [s]o long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board, 878 F.2d 875, 882 (5th Cir. 1989) (citation omitted) and cases cited therein; NLRB v. Alaska Pulp Corp., 149 LRRM 2684, 2689 (D.D.C 1995); accord: NLRB v. Carolina Food Processors, 81 F.3d at 511." Casehandling Manual, §11794

Without question the agreement between the UGSOA and the SEIU "touches upon a matter under investigation." The Act itself prohibits an affiliation, direct or indirect, between the UGSOA and the SEIU. It is undisputed that the SEIU wanted the UGSOA to merge. It is undisputed the UGSOA first attempted to fight the SEIU, then gave them a vital bargaining unit and entered into the agreement in question, presumably to avoid imminent financial collapse. Certainly the document in question is relevant to the issue of 9(b)(3) status. Whether it is ultimately determinative of that issue and how is a different inquiry, to be made by the Regional Director (and ultimately the Board) later. The SPFPA is entitled to the document and the right to argue its importance to the Region and the Board.

With respect to the claim that harm could insure to the Petitioner, the SPFPA has no idea where this claim came from. At the hearing, Petitioner refused to acknowledge the existence of the document. In its August 2nd e-mail to the Regional Director that requested the *in camera* review, no such claim was made. Thus, Petitioner must have made such a claim during *ex parte* communication with the Region. Previously I have requested from the Region copies of all *ex parte* communication between the Region and Petitioner regarding the subpoena issue but to date I have not received a reply. Certainly the Board rules do not permit secret arguments made seeking a secret review of a secret document. I reserve the right to supplement this appeal upon receipt of that information.

The UGSOA voluntarily entered into the agreement in question. It cannot shield its agreement by claiming that harm may occur by its release. We agree harm may occur – after all, the UGSOA may lose its 9(b)(3) status and the instant Petition may be dismissed – but surely that "harm" test cannot bar the production of arguably relevant evidence.

No reason is given for not placing the document in the record. It is without doubt relevant to the issue of 9(b)(3) status. The SPFPA respectfully requests that you overrule the Hearing Officer and direct that the agreement in question be produced.

The agreement between UGSOA and the SEIU is relevant to the inquiry. Whether it is dispositive, either by itself or considered with other evidence, is a different issue. That issue cannot be decided by a secret review by the Hearing Officer and/or Region. That issue must be decided after building a complete record with all parties having an opportunity to examine the evidence and make argument to the Regional Director and/or Board. A secret review of a secret document with a secret reason for rejecting it is not an appropriate procedure for analyzing evidence in general but in particular in this case. The Board's methods must be transparent to the parties or the Board's decisions will not be trusted.

In her Decision, the Regional Director selectively quotes out of context a portion of Intervenor's argument against the In Camera review as proposed by Petitioner and adopted by the Region. Intervenor argued (and continues to argue) not that In Camera reviews are not used in American jurisprudence or in the right circumstances by the Board, but that the method Petitioner demanded and the Region accepted in this case is improper. In its August 9th appeal, Intervenor stated:

I also reiterate what the SPFPA argued previously, that the UGSOA is requesting an in-camera review not utilized otherwise in American jurisprudence. In this regard rather than providing the document to a judge for the judge to decide whether it is relevant and should be released to the other side, it is asking that you make that determination and then return the document to the UGSOA without releasing it. I am not aware of any procedure – NLRB or in the federal district courts – that permits such a review.

In this case however, it does not matter what type of secret review was utilized, none was appropriate.

The Regional Director also criticizes Intervenor for not putting into the record copies of the LM forms or other available public documents (such as the lawsuit records). However, it was not until the morning of the hearing, when receiving Petitioner's Petition to Revoke the Subpoena, that Intervenor learned that Petitioner had entered into an agreement with the SEIU. It is unreasonable and unfair for Intervenor to have been required to have researched and submitted that day, apparently during the hearing, the documents now identified. Further, the Regional Director seems more concerned with process (and expeditiously deciding the issue) than with the statutorily required analysis of whether the UGSOA is permitted to represent guards. After all, this is a fact finding procedure and the Region has certain obligations to develop a full record. Regardless of how this issue came forward, at this point it is the Board's obligation to investigate and decide whether the UGSOA can be certified to represent guards.

Further, with respect to the Region's ex parte communications with Petitioner that led to the Hearing Officer's ruling, the Regional Director states that ex parte communications between parties and the Hearing Officer are to be expected. That may be in some circumstances, especially before the hearing opens and after it closes, but not this: A subpoena was enforced, it remained an open issue and yet Petitioner was permitted to make arguments — unknown to Intervenor — to the Hearing Officer and/or Regional Director that eventually caused the subpoena enforcement decision to be overturned (after a secret review of a secret document). If these decision-making processes result from secret discussions between a party and the Region, then certainly the remaining parties will lose all faith in whether the Board has acted appropriately. The Board's decision making process must be transparent and open and should not and cannot be based on secret arguments advanced by one party without disclosure to the other.

Additionally, the Board should direct the Region to reopen the hearing and permit the introduction of additional evidence. Without prior warning the Hearing Officer peremptorily closed the hearing without the SPFPA being giving the ability to submit additional evidence, including a witness not available to the SPFPA until after the July 28th hearing. In its August 18th appeal to the Regional Director, Intervenor stated:

In his August 12th letter and without prior notice that he was considering doing so, the Hearing Officer directed that the record be closed. Three days earlier, in my August 9th letter to you, I stated that the SPFPA had additional evidence to introduce into the record when the hearing resumed. No one from the Region questioned me as to what additional evidence I had. With all due respect, I can only conclude that despite this being a fact finding concerning a very important statutory issue, the Region is more concerned with dealing with this matter expeditiously rather than ensuring there is a complete record. My client also suspects that the hearing was prematurely closed in this fashion simply to prevent it from introducing further evidence regarding the UGSOA's 9(b)(3) status. One can imagine how the lack of transparency in the Region's handling of this case to date might make the SPFPA suspicious in this regard.

Please remember that the UGSOA did not reveal that it had entered into an agreement with the SEIU until it filed its Petition to Revoke the Subpoena, a copy of which I received the morning of the hearing. Certainly we could not be expected to present all available evidence the same day we were informed of the existence of an agreement between the UGSOA and the SEIU.

At the hearing we intend to call at least one witness who was not available to the SPFPA at the time of the July 28th hearing (he resigned from the UGSOA on July 29th) and introduce other documents directly relevant to the issue of the UGSOA's 9(b)(3) status.

We respectfully remind you that this proceeding is a fact finding proceeding and that the prohibition on affiliation between guard and non-guard unions is of such importance that Congress wrote it into the Act. Even if the Region continues to deny the SPFPA access to the secret agreement between the UGSOA and the SEIU, it must permit the SPFPA to make its complete record with respect to the 9(b)(3) issue. Closing the record without that opportunity not only prejudices the SPFPA's rights but also prevents the Board from ensuring that it will reach the right decision in this case.

The Board should direct that the hearing be reopened, the subpoenaed document be produced, the subpoenaed enforced otherwise and that Intervenor be permitted to introduce additional evidence relevant to the issue.

Conclusion:

For the foregoing reasons, and on the basis of the entire record, review of the Regional Director's Decision is appropriate. The Regional Director's Decision and Order departs from established Board precedent, and her decision on these substantial factual issues is clearly erroneous on the record. As such, there are compelling grounds for review, and the Board should direct the hearing be reopened as discussed above.

Respectfully submitted,

Scott A. Brooks

Gregory, Moore, Jeakle & Brooks 65 Cadillac Square, Suite 3727

Detroit, MI 48226

Dated: September 14, 2010

Certification of Service

Copies of the foregoing Petitioner's Request for Review have been immediately served upon the following by first class mail or as otherwise stated:

Robert Kapitan, counsel for UGSOA Via e-mail

Brad Odum Security Consultants Group, Inc. 102 Mitchell Road, Suite 100 Oakland Ridge, TN 37830

Martha Kinard, Regional Director Via e-mail

Scott A. Brooks

Dated: September 14, 2010